**Office of Chief Counsel**
**Internal Revenue Service**

# memorandum

CC:LM:MCT:PHI:TL-N-830-01
RHGannon

date:

to: Internal Revenue Service
3 Bethlehem Plaza
Bethlehem, PA 18018
Attention: Revenue Agent Joseph McCarthy

from: RICHARD H. GANNON
Special Litigation Assistant

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subject: [redacted] / [redacted]
**Statute of Limitations Issue**
**Request for Routine Advice**

This memorandum is in response to your recent request for advice regarding the statute of limitations for assessment in this case.

**ISSUES:**

1. Whether [redacted] ("[redacted]"), Successor in Interest to [redacted] ("[redacted]") is liable, either in equity or in law, as a transferee for [redacted]'s [redacted] corporate income tax liability.

2. Whether assessment and collection of [redacted]'s [redacted] corporate income tax liability is barred by the period of limitations.

**CONCLUSION:**

1. [redacted] is liable as successor in interest to [redacted], but not as a transferee at law because [redacted] did not affirmatively assume [redacted]'s liabilities in the merger agreement.

2. The assessment and collection of [redacted]'s liability as successor in interest to [redacted] ("primary liability") for [redacted] is barred by the period of limitations.

**FACTS:**

[redacted] was a U.S. subsidiary of [redacted]

("[redacted]"), a Belgian corporation. Both [redacted] and [redacted] were engaged in the business of cement manufacturing, [redacted] in the United States, and [redacted] and its foreign affiliates in Europe and Canada. [redacted] was the parent of a U.S. group of corporations filing consolidated returns. [redacted]'s return for the calendar year [redacted] is under examination.[1]

On [redacted], [redacted] entered into a reorganization agreement with, among other parties, [redacted], a German company. [redacted], a subsidiary of [redacted] and a Delaware corporation, has long been engaged in the U.S. cement business with operations, among other places, in Eastern Pennsylvania. Effective on [redacted], [redacted] merged into [redacted] pursuant to a merger agreement. Section 1.3 of the Merger agreement provided, in pertinent part, that

> The Merger shall have the effects specified in the [Delaware General Corporation Law] and, upon the effectiveness of the Merger, . . . all rights of creditors and all liens upon any property of either Constituent Corporation shall thenceforth attach to the Surviving Corporation to the same extent as if such debts, liabilities and duties had been incurred or contracted by it.

During the course of the examination of [redacted]'s [redacted] return, the period of limitations was purportedly extended three times, on [redacted], [redacted] and [redacted].[2] The first two extensions purported to extend the period of limitations to [redacted]. The last one purported to extend the period of limitations to [redacted]. The Service first received notice that the merger had taken place on or about [redacted], when [redacted] filed its final return for the short period ending [redacted] and enclosed a copy of the merger agreement and certificate of merger to the return.

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[1] [redacted]'s returns for the periods ending [redacted] and [redacted] are also under examination. Returns for those years were filed, respectively, on or about [redacted] and [redacted].

[2] These are the dates the Forms 872 in question were signed on behalf of the Service. Each 872 had already been signed on behalf of the taxpayer.

**LAW**

Under I.R.C. § 6501(a), the period of limitations for assessing an income tax liability expires three years after the date the return was filed. We are advised that [redacted]'s [redacted] was filed on or about [redacted]. By operation of § 6501(a), the period of limitations for assessment of income tax liabilities attributable to [redacted]'s [redacted] return expired on [redacted]. On [redacted], [redacted]'s existence ceased when it merged into [redacted].

Once a corporation ceases to exist, any existing powers of attorney terminate, Malone & Hyde, Inc., T.C. Memo 1992-661 (1992), and the corporation can no longer extend the period of limitations. Paramount Warrior, Inc., T.C. Memo 1976-400 (1976). Under Delaware's merger law, the surviving corporation in a merger (in this case, Heidelberg) normally succeeds to the assets and liabilities of the disappearing corporation (in this case, [redacted]) by operation of law. See, e.g. Southern Pacific Transportation Company v. Commissioner, 84 T.C. 387 (1985).[3]

Southern Pacific stands for the general proposition that while the surviving corporation in a merger becomes the primary obligor for the disappearing corporation's debts, it also can become a liable as a transferee at law with respect to the same liabilities. In that case, I.R.C. § 6901(a) adds an additional year to the period of limitations, running from the expiration of the statutory period for assessing the "primary" liability.

The fact giving rise to transferee liability in Southern Pacific was the surviving corporation's express assumption of the liabilities of the disappearing corporation.[4] According to the merger agreement in that case,

> On and after the effective date of this agreement, [surving corporation] hereby expressly assumes liability for obligatinos of any kind whatsoever, without exception, owned, incurred or assumed by [disappearing corporation] . . . .

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[3] The mergers in both Southern Pacific and this case were governed by Delaware law.

[4] Note that transferee liability is normally determined under state law. Comisssioner v. Stern, 357 U.S. 39 (1958).

This was the fact that led the Court in Southern Pacific to find that the surviving corporation was liable as a transferee at law, in addition to its primary liability as successor in interest.

A review of the merger agreement in this case fails to reveal any language whereby [redacted] expressly assumes liability for [redacted]'s debts. While, as noted above, there is language in the merger agreement stating that [redacted] will become primarily liable for [redacted]'s debts as a result of the merger, this does not rise to the express assumption of debt. Missile Systems Corp. of Texas v. Commissioner, TC Memo 1964-212 (1964).

In Missile Systems, a taxpayer-corporation's stock was merged into an acquiring company. Both companies were organized under the laws of Delaware. As in this case, the merger agreement did not contain any language whereby the surviving corporation contractually assumed liability for the disappearing corporation's debt. Accordingly, held the Court, the surviving corporation was not liable as a transferee.

**DISCUSSION**

In this case, there is no evidence that [redacted] expressly assumed liability for [redacted]'s debt. While, in passing, the language quoted from the merger agreement above might bear passing resemblance to an assumption of liability, further scrutiny reveals that the language in question merely gave notice that [redacted] succeeded to [redacted]s assets and liabilities by operation of law. This is different from the contractual assumption of liability found in Southern Pacific and its predecessors.

Moreover, while, under some circumstances, a taxpayer may be estopped to deny the efficacy of a consent where the Service was misled into believing that the corporation had the authority to extend the period of limitations, the fact that we were made aware of the merger almost a year before the first consent was executed makes it to argue that our reliance on the apparent authority of the taxpayer's representative was reasonable. As noted by the Tax Court in Paramount Warrior, there can be no apparent authority without actual authority, and actual authority disappeared when [redacted] was merged into [redacted]. We believe that, faced with this issue, a court would hold that the consents were without effect when they were signed.

[redacted], as successor in interest, was the proper party to extend the statute in this case with respect to [redacted]'s [redacted] tax liabilities, not [redacted] itself. Since there is no transferee liability, and since assessment of [redacted]'s primary or successor liability is time barred, assessment of [redacted]'s income tax liability for [redacted] is barred.

Finally, we note that the period of limitations for assessing [redacted]'s liability as successor in interest to [redacted]'s liabilities for the periods ending [redacted] and [redacted] runs, respectively, sometime on or before [redacted] and [redacted].[5] [redacted] should be listed on any reports relating to those years in the following fashion:

> [redacted], Successor
> in Interest to [redacted]
> [redacted].

**CONCLUSION**

We conclude that assessment and collection of [redacted]'s federal income tax liabilities for [redacted] is barred by the period of limitations.

We invite further comment should you deem it necessary.

RICHARD H. GANNON
Special Litigation Assistant

APPROVED:

JAMES C. FEE, JR.
Associate Area Counsel
(Large and Mid-Size Business)

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[5] The returns for these periods were received, respectively, on [redacted] and [redacted]. If mailed to the Service (as opposed to being hand delivered), the "timely mailing, timely filing" rule of I.R.C. § 7502(a) would ordinarily be applicable, pushing the statute expiration date back to three years from the mailing date. Careful consideration should be given to this rule to insure that the statute is properly protected.